

## Reauthorize Anti-Terror Tools Now

Prior to September 11, 2001, government surveillance authorities fell, broadly, into two categories: ordinary domestic crime and foreign intelligence information collection. A rigid divide between the two undermined the government's ability to "connect the dots" in terrorism investigations because it prevented domestic law enforcement officers from collaborating with national security personnel. To protect against future threats to our security, government investigators needed more appropriate counterterrorism and foreign intelligence tools.

As a result, Congress enacted the USA PATRIOT Act<sup>1</sup> and other legislative responses, three provisions of which are scheduled to expire at the end of February.

### The Three Expiring Provisions

"Roving Wiretaps": Allows the government, *with court approval*, to monitor the communications of a particular terrorism suspect even when that suspect frequently changes telephone numbers or e-mail addresses.<sup>2</sup>

- This ability is crucial, particularly in the age of disposable cell phones, which terrorists are known to use and frequently replace. This authority has become a key component of counter-terrorism investigations and was used approximately 147 times between 2004 and 2007.<sup>3</sup>
- This type of wiretap authority has been available to federal criminal law enforcement since 1986 and has been found constitutional by the courts.<sup>4</sup> As with any electronic surveillance, a roving wiretap cannot be used without a court order based on a finding of probable cause. There have been no legal challenges to this provision.

"Business Records" Provision (Section 215): Provides a means under foreign intelligence law for the government to obtain, *with prior court approval*, tangible things, including business records.<sup>5</sup>

- Under Supreme Court precedent, business records, such as banking deposit slips or car rental records, are not subject to Fourth Amendment protections because the customer has no reasonable expectation of privacy in documents that are in the possession of third parties.<sup>6</sup> In national security investigations before 2001, Congress chose to limit investigators only to seeking access to an artificially limited category of business records.<sup>7</sup>
- Under current law, before the government may obtain a business records order, a specialized federal judge must find there are "reasonable grounds to believe" the records are relevant to a foreign intelligence investigation, or to international terrorism or clandestine activities. These types of orders are crucial to the early stages of a terror investigation, allowing the government to connect dots. This vital tool has become a staple of counterterrorism efforts, with investigators using this authority 223 times between 2004 and 2007.<sup>8</sup> FBI Director Mueller has called this tool "exceptionally helpful and useful in our national security investigations."<sup>9</sup>
- The provision is sensitive to First Amendment rights and values. An order cannot be based solely on First Amendment protected activities, and only three specified, high-ranking federal officials have the authority to request these orders in certain sensitive areas – such as library records. This section puts higher burdens on law enforcement in terrorism cases than otherwise apply to ordinary grand jury subpoenas seeking similar documents in standard criminal law enforcement.

**“Lone Wolf” Provision:** This provision of the Intelligence Reform and Terrorism Protection Act<sup>10</sup> allows the government to get a court order, upon showing of probable cause, from a specialized federal court, to conduct surveillance or physically search suspected foreign terrorists without first having to prove that those suspects are connected with a foreign power or identified terror network *but only if those suspects are not American citizens or legal permanent residents*.

- In the days prior to the September 11 attacks, Zacarias Moussaoui was detained on immigration charges. The FBI suspected he was involved in terrorist activity but had insufficient evidence to establish probable cause to prove he was connected to Al Qaeda. Consequently, the FBI could not secure the necessary court orders for certain searches. Numerous incidents in the last decade have demonstrated the potential danger of so-called “lone wolf” terrorists. When the FBI learns of such an actor, it should be able to conduct a complete foreign intelligence investigation.
- Opponents of this provision point to the fact that the provision has never been used as reason it should be repealed. FBI Director Muller has testified that the “lone wolf” authority remains an important tool.<sup>11</sup> We should not “disarm” federal law enforcement or intelligence agencies faced with a lone wolf scenario. This provision also has never been subjected to a legal challenge.

### **A Record of Success, a Continuing Need**

In spite of repeated attempts and continuing threats, the American homeland has not suffered a successful, large scale attack since September 11, 2001. Although much of the information on counterterrorism efforts is classified, public reports indicate that the Patriot Act, including some of the provisions set to expire, has been vital to ensuring our nation’s continued safety.<sup>12</sup>

For example, in September 2009 FBI agents arrested Najibullah Zazi, an Afghan-born legal permanent resident of the United States.<sup>13</sup> Mr. Zazi had been carefully monitored by government investigators, using authorities under the Patriot Act, for several weeks leading up to his arrest.<sup>14</sup> Mr. Zazi had been plotting, with several others, to manufacture explosives for use in domestic terror attacks.<sup>15</sup> Mr. Zazi pleaded guilty in February 2010 to plotting to use explosives in domestic terror attacks.<sup>16</sup>

Those who seek to weaken the tools currently available to our law enforcement and intelligence agencies must make the case that the existing law is unnecessary or counterproductive. No such case has been made. The Senate should act to make sure our law enforcement and intelligence professionals have the tools they need to stop those threats to our national security at every turn.

---

<sup>1</sup> Public Law No. 107-56.

<sup>2</sup> USA PATRIOT Act § 206.

<sup>3</sup> Testimony of Robert S. Mueller, III, Senate Judiciary Committee, March 25, 2009.

<sup>4</sup> *U.S. v. Bianco*, 998 F.2d 1112 (2d Cir. 1993); *U.S. v. Petti*, 973 F.2d 1441 (9<sup>th</sup> Cir. 1992).

<sup>5</sup> USA PATRIOT Act, § 215.

<sup>6</sup> *U.S. v. Miller*, 425 U.S. 435 (1976).

<sup>7</sup> These were: records from common carriers, public accommodations, storage facilities, and car rental services.

<sup>8</sup> [Testimony of Robert S. Mueller, III](#), Senate Judiciary Committee, March 25, 2009.

<sup>9</sup> *Id.*

<sup>10</sup> Public Law No. 105-458, § 6001(a).

<sup>11</sup> E.g., [Testimony of Robert S. Mueller, III](#), Senate Judiciary Committee, September 16, 2009; [Testimony of Robert S. Mueller, III](#), Senate Judiciary Committee, March 25, 2009.

<sup>12</sup> [“Terrorism Case Shows Range of Investigators’ Tools,”](#) *NPR*, February 22, 2010, , mentioning in particular the role of roving wiretaps and delayed notice warrants in the Zazi case.

<sup>13</sup> [“Najibullah Zazi Indicted for Conspiracy,”](#) Department of Justice Press Release, September 24, 2009,

<sup>14</sup> [“Obama Team Says Zazi Case Illustrates Balanced Approach to Terror Threat,”](#) Washington Post, October 6, 2009.

<sup>15</sup> *U.S. v. Zazi*, Memorandum of Law in Support of Government’s Motion for a Permanent Order of Detention, September 24, 2009.

<sup>16</sup> [“Najibullah Zazi Pleads Guilty ...,”](#) U.S. Department of Justice Press Release, February 22, 2010.